

Judge Moore initially entered a May 10, 2012, Preliminary Hearing Order appointing Dr. John Ciccarelli to conduct an independent medical evaluation of claimant. Judge Moore asked Dr. Ciccarelli to address whether claimant's accidental injury was the

prevailing factor in causing claimant's current complaint, presenting condition or need for treatment, if any.¹

Dr. Ciccarelli evaluated claimant and issued a report dated August 7, 2012. Dr. Ciccarelli opined that claimant had "intermittent episodes in the past regarding back issues and strains as well as occasional radicular symptoms that have all seemed to return back to baseline."² Dr. Ciccarelli noted claimant had not had any ongoing or active low back treatment just prior to her June 25, 2011, accident, perhaps since early-2007. Dr. Ciccarelli noted, "I feel she does have just some underlying lumbar strain coupled with some underlying degenerative changes that were likely aggravated from her work injury. She also has some work related greater trochanteric bursitis causing her left lateral thigh pain."³

Dr. Ciccarelli opined claimant might benefit from a left greater trochanteric bursal injection and possibly even a facet block to the L4-5 level.

Following receipt of Dr. Ciccarelli's report, Judge Moore issued a second Preliminary Hearing Order in which he ruled claimant was entitled to medical treatment. Judge Moore ordered respondent to provide claimant a list of two physicians from which she could select an authorized treating physician.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-555c(a) confers upon the Board the authority to review "all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

¹ ALJ Order (May 10, 2012) at 1.

² Ciccarelli August 7, 2012 IME Report at 7.

³ *Id.*

...

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

After reviewing the sparse record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

The administrative file contains no transcript. There is no testimony. No exhibits were entered into evidence. Judge Moore issued his ruling after receiving Dr. Ciccarelli's report. As such, Judge Moore's two orders and Dr. Ciccarelli's report comprise the entirety of the record.

Both parties supplied briefs. Statements in both parties' briefs concerning claimant's preexisting condition are not evidence. Reports from medical providers cited in the briefs are not in evidence. Dr. Ciccarelli's report is the only evidence in this case.

Dr. Ciccarelli need not specifically use the term "prevailing factor." Dr. Ciccarelli identified a lumbar strain that occurred years after claimant last received medical treatment for a lumbar condition. Dr. Ciccarelli stated, "She has really not been involved in any

ongoing active treatment prior to her injury of June 25, 2011, that I can see from records and she does not report any as well.”⁴ Judge Moore may have viewed such statement as Dr. Ciccarelli discounting claimant’s prior low back condition as being a prevailing or primary factor in claimant’s symptoms, and further that the work accident was the main culprit in claimant’s current medical condition, need for medical treatment and disability. This Board Member agrees.

Additionally, claimant’s prior low back injuries focused on the L5-S1 vertebrae. Dr. Ciccarelli stated claimant’s June 29, 2011, MRI showed a mild or minimal bulge at L4-5 and suggested a possible L4-5 facet block. Additionally, Dr. Ciccarelli suggested treatment for work-related left trochanteric bursitis. Based on Dr. Ciccarelli’s recitation of claimant’s pertinent medical history, it does not appear claimant had prior treatment for her L4-5 vertebrae or for her left hip. Therefore, claimant’s injury is not solely an aggravation of a preexisting condition.

CONCLUSION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 28, 2012, is hereby affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

⁴ *Id.*

⁵ K.S.A. 2011 Supp. 44-534a.

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Bruce E. Moore, Administrative Law Judge